

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
City and County of Honolulu's	)	Docket No. NPDES-09-92-0001
Honouliuli Wastewater	)	
Treatment Plant,	)	
	)	
	)	
Permittee	)	

ORDER DENYING MOTION TO COMPEL

Under date of November 8, 1993, Petitioners filed a motion for an order, pursuant to 40 CFR § 124.74(c)(4), compelling the attendance as witnesses at the hearing of eight identified EPA witnesses and the "custodian/sponsor" of the Administrative Record; 33 identified employees or witnesses of the City and County of Honolulu ("City"); two identified members of Hawaii Water Pollution Control Association ("HWPCA") and unnamed members, officers, directors, employees, consultants and agents of HWPCA involved in any way in the NPDES permit proceeding for the Honouliuli WWTP at issue herein; three identified partners of Gray, Hong, Bills & Associates ("Bills"), and unnamed members, officers, directors, employees, consultants and agents of Bills involved in any way in the NPDES permit proceeding for the Honouliuli WWTP; and Dr. John C. Lewin, Director, Department of Health for the State of Hawaii. No explanation or justification was offered in support of the motion.

EPA filed an "Opposition" to the motion under date of November 15, 1993, pointing out, inter alia, that Petitioners wished to compel the attendance of four EPA witnesses from whom the Agency has submitted proposed testimony, four EPA employees who would be "new" witnesses and the "custodian/sponsor" of the Administrative Record (AR). EPA asserts that the custodian and sponsors of the AR are not the same individuals and that the custodian of the AR is an EPA employee, whom the Agency intends to call as a witness. EPA states, however, that this witness could not sponsor all portions of the AR and argues that requiring the Agency to produce unidentified employees to sponsor the remainder of the AR hasn't been shown to be necessary or beneficial.

Although acknowledging that the Part 124 rules provide no standard to guide the ALJ's determination to compel testimony in accordance with §§ 124.74(c) and 124.84(d), EPA argues that Petitioners should be required to make some showing of necessity or at the very least that their case will be benefitted or assisted in some way by the testimony of the witnesses targeted by the motion. In accordance with the presumption that heads of executive agencies and senior staff are normally exempt from deposition or from being compelled to give oral testimony, EPA argues that the Director of the Water Management Division, Mr. Harry Seraydarian, should not be compelled to appear as a witness herein. Additionally, EPA points out that the State of Hawaii is not a party to this proceeding and that the ALJ,

lacking subpoena power, may not compel the testimony of the Director of the Hawaii Department of Health, Dr. John Lewin. Petitioners appear to recognize this fact for Dr. Lewin is designated as a "Third Party Witness." For all of the above reasons, EPA urges that Petitioners' motion be denied.

The City filed an "Opposition" to Petitioners' motion on November 17, 1993. The City points out that while Petitioners have repeatedly complained of the large number of City witnesses,<sup>1/</sup> they now seek to dramatically increase the length of the hearing by adding at least 25 more witnesses. The City asserts that implicit in the requirement for filing a motion to compel the testimony of additional witnesses pursuant to 40 CFR § 124.74(c)(4) is a demonstration that the additional witnesses fall within the categories specified in § 124.74(c)(4)(i), that the testimony of the additional witnesses is relevant to the hearing issues, and that this testimony will assist in the clarification and/or resolution of disputed issues of material fact. The City emphasizes that Petitioners have not even attempted to make any such showing.

Secondly, the City says that the testimony of additional City witnesses sought by Petitioners is neither relevant nor appropriate for the evidentiary hearing and that Petitioners' motion cannot be supported. The City alleges, without

---

<sup>1/</sup> The City stated that it was withdrawing one of its proposed witnesses, Dr. Robert Spies, as his testimony was duplicative of the testimony of other City witnesses, thus reducing the number of City witnesses to 18.

identifying the individuals, that several of the 14 additional witnesses which Petitioners ask that the City be required to produce are neither "officers, directors, employees, consultants or agents" and, consequently, that the City lacks the ability to compel them to attend the evidentiary hearing. Moreover, the City asserts, again without specificity, that some of these 14 individuals have no personal knowledge of the Honouliuli plant or of the designated hearing issues, while others have only general knowledge of the plant. Therefore, the City contends that these individuals have nothing to contribute to the evidentiary hearing, that calling them would be a waste of time and that Petitioners' motion should be denied.

"Bills" responded to Petitioners' motion under date of November 12, 1993, stating erroneously that it had been granted inactive status.<sup>2/</sup> "Bills" asserted that, if Petitioners' motion to compel were granted, it wished to retain its status as an active party. Regarding the Petitioners' request that Brian L. Gray, Daniel S. C. Hong and other unnamed members of Gray, Hong, Bills & Associates be compelled to appear as witnesses, "Bills" pointed out that only David B. Bills

---

<sup>2/</sup> In fact, the ALJ's order, dated November 9, 1993, merely indicated an intention to place HWPCA and "Bills" in inactive status in the absence of an indication from these parties that they intended to actively participate in the hearing (Id. at 5).

requested to be an admitted party and asserted that Petitioners' motion was inappropriate.<sup>3/</sup>

HWPCA filed a response to Petitioners' motion to dismiss on November 12, 1993. HWPCA's response did not refer to the motion to compel. HWPCA stated that for the sake of facilitating and expediting resolution of the issues, "we are willing to lay back" in the proceedings. HWPCA indicated, however, that it wished to preserve its right of appeal and of judicial review. This statement of HWPCA is interpreted as consent to inactive status.

#### D I S C U S S I O N

Petitioners' motion includes persons who have submitted proposed written testimony as well as additional persons named and unnamed. Persons who have submitted proposed testimony with the exception of Dr. Robert Spies (supra note 1), presumably will appear to give testimony on a schedule agreed to by counsel and the following discussion is directed to the motion insofar as it seeks to compel testimony from persons named and unnamed.

---

<sup>3/</sup> It is, of course, clear that actively participating in the hearing by, e.g., examining and cross-examining witnesses, is a different matter than appearing as a witness either voluntarily or in response to an order of the ALJ. Moreover, the statement required by 40 CFR § 124.74(c)(4) as a condition to being admitted as a party, i.e., that, upon order of the ALJ, he will make available to testify "(a)ll officers, directors, employees, consultants, and agencies of the requester and the persons represented by the requester," is obviously not limited to the person signing the request.

It is my conclusion that a requirement for "good cause" may reasonably be imparted into the authority granted by 40 CFR § 124.74(c)(4) to compel a party to produce for testimony, among others, "(iii) (a)ll officers, directors, employees, consultants, and agents of the requester and persons represented by the requestor." See Order, dated November 9, 1993, at 4. Petitioners have made no effort to satisfy this standard and, indeed, have not alleged any reasons why the numerous named and unnamed persons include in the motion should be compelled to appear as witnesses. Accordingly, Petitioners' motion will be denied.

The motion insofar as it seeks to compel the appearance and testimony of the Director of the Water Division, EPA, Region IX, Mr. Harry Seraydarian, will be denied for the additional reason that such government officials are normally exempt from being compelled to give oral testimony or submit to depositions.

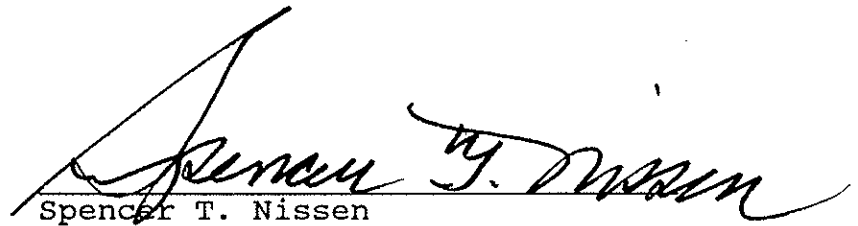
The actual or potential health affects of the Honouliuli discharge are obviously at issue and it may well be that the testimony of the Director of the Hawaii Department of Health or some other official of that Department would be relevant and material. Because the State of Hawaii is not a party to this proceeding and because the ALJ does not have the authority to issue subpoenas, that testimony may not be compelled. The motion that Dr. John Lewin, Director of the Hawaii Department of Health, be compelled to appear and give testimony will be denied.

My intention to issue an order designating HWPCA and "Bills" as inactive parties is reiterated.

O R D E R


For the reasons stated, Petitioners' motion to compel is denied.

Dated this 23rd day of November 1993.

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER DENYING MOTION TO COMPEL, dated November 23, 1993, in re: City and County of Honolulu's Honouliuli Wastewater Treatment Plant, Dkt. No. NPDES-09-92-0001, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Permittee and EPA (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: November 23, 1993

ADDRESSEES:

Paul P. Spaulding III, Esq.  
Denise E. Antolini, Esq.  
Sierra Club Legal Defense Fund  
212 Merchant Street, Suite 202  
Honolulu, HI 96813

David E. Moser, Esq.  
David Andrews, Esq.  
McCutchen, Doyle, Brown & Enersen  
Three Embarcadero Center  
San Francisco, CA 94111

Cheryl K. Okuma-Sepe, Esq.  
Deputy Corporation Counsel  
City and County of Honolulu  
First Floor, City Hall  
530 South King Street  
Honolulu, HI 96813

Mr. David B. Bills  
Gray, Hong, Bills & Associates, Inc.  
119 Merchant Street, Suite 607  
Honolulu, HI 96813

James S. Kumagai, Ph.D.  
Reginald H. F. Young, Sc.D.  
Hawaii Water Pollution Control Association  
P.O. Box 2422  
Honolulu, HI 96804

Christopher A. Sproul, Esq.  
Laurie Kermish, Esq.  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Mr. Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

NOTE: COPIES WERE ALSO FAXED